

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 15 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

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Amendment of Part 20 and 24 of the)
Commission's Rules -- Broadband)
PCS Competitive Bidding and the)
Commercial Mobile Radio Service)
Spectrum Cap)

WT Docket No. 96-59

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**COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

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SUMMARY

By this *Notice*, the Commission seeks comment on rules for auctioning the remaining 10 MHz broadband PCS authorizations. Appropriately, the *Notice* proposals reflect insights gained by the Commission in prior auctions for the 30 MHz PCS licenses and, in particular, the experience of attempting to craft race- and gender-based preferences for the C Block auction. As discussed below and in its comments, PCIA believes the *Notice* sensibly concludes that, in view of the legal difficulties and potential delays inherent in race- and gender-based preferences, the goal of increasing diversity in wireless telecommunications can and should in this instance be accomplished through alternative means. In particular, PCIA favors strong small business incentives, which will assist a broader range of applicants to participate meaningfully in the auctions and in rendering new and improved services to the public.

PCIA generally supports the *Notice* proposals for auctioning the D, E, and F Block PCS spectrum. PCIA, however, suggests a few changes to assist small businesses in capital formation and obtaining licenses. In particular, PCIA suggests that the Commission should:

- ▶ Expediently conclude this proceeding and move to auctioning the remaining PCS spectrum blocks without delay and without risking possible judicially-imposed postponements;
- ▶ Allow small businesses to utilize the 50.1/49.9 percent equity control group option when forming applicant entities for the auctions;
- ▶ Adopt the compromise proposal to exempt from attribution the financial resources of companies that would themselves qualify as entrepreneurial companies;

- ▶ Retain the exemption from attribution for Indian tribes and Alaskan Regional or Tribal councils;
- ▶ Set aside the F Block for entrepreneurs and small businesses, providing tiered bidding credits and installment payment plans keyed to the overall size of the bidding entity, as well as retaining the lower upfront payment and down payment requirements;
- ▶ Eliminate the transfer restrictions on F Block authorizations, allowing licensees to transfer or assign licenses post-auction to any qualifying entrepreneurial company; and,
- ▶ Auction the D, E, and F Block licenses concurrently to speed entry of new broadband PCS licensees into the market. In the event litigation is anticipated to threaten delay in the 10 MHz block auction, however, PCIA urges the FCC to separate out any such spectrum block and proceed to auction those licenses not subject to challenge as expeditiously as possible. The Commission's assessment should include challenges directly affecting any of the 10 MHz blocks as well as litigation stemming out of the current C Block auction.

By providing these benefits and preferences to small businesses, PCIA believes the auctions will result in the dissemination of licenses to a broad range of licensees, including a variety of small businesses. These benefits will also assist in the participation by minority- and women-owned companies, which, as the Commission observes, often fall within the category of small businesses. PCIA accordingly urges the Commission to adopt these measures and rapidly conclude this proceeding.

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**COMMENTS OF THE
PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA")¹ hereby submits its comments in response to the above-captioned Notice of Proposed Rulemaking by the Commission.² With the auctions for the 30 MHz Personal Communications Service ("PCS") licenses drawing to a close, this *Notice* seeks comment on appropriate rules and regulations governing the competitive bidding for the 10 MHz D, E, and F Block PCS licenses. As discussed below, PCIA largely concurs with the general framework for the 10 MHz PCS

¹ PCIA is the international trade association created to represent the interests of both the commercial and the private mobile radio service communications industries. PCIA's federation of councils includes: the Paging and Narrowband PCS Alliance, the Broadband PCS Alliance, the Specialized Mobile Radio Alliance, the Site Owners and Managers Association, the Association of Wireless System Integrators, the Association of Communications Technicians, and the Private System Users Alliance. In addition, as the FCC-appointed frequency coordinator for the 450-512 MHz bands in the Business Radio Service, the 800 and 900 MHz Business Pools, the 800 MHz General Category frequencies for Business Eligibles and conventional SMR systems, and the 929 MHz paging frequencies, PCIA represents and serves the interests of tens of thousands of licensees.

² Amendment of Part 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59 (Mar. 20, 1996) ("*Notice*").

licenses set forth in the *Notice* and offers only a few minor suggestions for facilitating entry by small businesses. PCIA urges the Commission to proceed expeditiously with final resolution of these issues, minimizing potential judicial delays, and allowing applicants to bring new and innovative services and offerings rapidly to the public.

I. INTRODUCTION

This proceeding marks the regulatory conclusion to the initial licensing of broadband PCS. The Commission has already adopted rules for, and largely completed, competitive bidding for the 30 MHz authorizations and, by this action, sets the stage for the auctions of the remaining three sets of 10 MHz broadband licenses. Already, Block A and Block B licensees have entered the wireless market and begun offering new services to the public. At the same time, after suffering numerous judicially-imposed delays, the C Block auction is finally winding to a close.

The *Notice's* proposals for auctioning the remaining spectrum blocks build upon the experience gained by the Commission in the licensing of 30 MHz broadband PCS authorizations. In those auctions, the Commission attempted to promote entry by women- and minority-owned companies, rural telephone companies, and small businesses -- the so-called "designated entities" or "DEs" -- by setting aside the C Block for entrepreneurial entities; by engineering a complex set of affiliation and enterprise organization rules designed to allow DEs to attract financing while retaining operational control of their companies; and, by crafting a range of preferences for designated entities, including lower upfront payments,

bidding credits, installment payment plans, and reduced down payments. However, the Commission's proposals were derailed by various judicially-imposed delays and the Supreme Court's decision in *Adarand Constructors v. Peña*.³ Although the C Block auction finally began in December of 1996, further auction regulations must be measured against the new framework for evaluating race-based preferences announced in *Adarand*, a standard requiring "strict scrutiny."⁴

As discussed below, PCIA agrees with the *Notice*'s conclusion that the Commission's prior experience with the difficulty of crafting race- and gender-based preferences must form the basis for its decisions in this proceeding.⁵ Accordingly, PCIA advocates expediting the entry of new broadband PCS licensees into the wireless marketplace and speeding the availability of novel services to the public by developing strong small-business preferences, which will assist women- and minority-owned companies and minimize the potential for further judicial delays. PCIA's specific suggestions are discussed in more detail below.

³ 115 S. Ct. 2097 (1995).

⁴ *Notice*, ¶13.

⁵ *Id.*, ¶26.

II. THE COMMISSION SHOULD PROCEED EXPEDITIOUSLY WITH THE FINAL AUCTIONS FOR BROADBAND PCS

A. Concluding the D, E, and F Block PCS Auctions Is Critical to Wireless Competition

Bringing the D, E, and F Block PCS auctions to a rapid close and licensing new entrants expeditiously is critical to wireless competition. In the *Notice*, the FCC observes that already "representatives of the telecommunications industry have voiced a need to have the D, E, and F block licenses awarded quickly."⁶ PCIA concurs wholeheartedly, and urges the FCC both to conclude this proceeding in a timely manner and minimize, wherever possible, the potential for further delay.

PCIA has consistently urged the need for expedition in auctioning PCS spectrum and continues to do so in this context.⁷ For new entrants, any delays in the auctions postpone their entry into new wireless markets and may undermine their ability to compete for new customers. As the FCC observes, "it will be important to [new applicants] to acquire licenses quickly so that they can compete at the earliest point possible with other providers of

⁶ *Id.*

⁷ See Comments of PCIA at 2, PP Docket 93-253 (filed Apr. 3, 1995) (stating "PCIA has consistently supported the prompt introduction of competitive PCS. [Judicial stays] . . . introduce[] both delay and uncertainty into the marketplace, affecting both potential applicants and potential investors and/or partners. This uncertainty undermines investor confidence, which will have repercussions for the number of entities capable of participating in the PCS auctions as well as diversity in the marketplace. Undue delay will hinder the achievement of a fully competitive PCS environment."). See also Letter from Jay Kitchen, President, Personal Communications Industry Association, to Reed E. Hundt, Chairman, Federal Communications Commission (Feb. 22, 1995).

CMRS, and with wireline service providers."⁸ For existing PCS, SMR, and cellular entrants supplementing their existing spectrum, rapid conclusion of the auctions will also assist in bringing needed new services to the public and stimulating innovation. The industry simply cannot afford a delay comparable to the half-year that transpired between completion of the *Sixth Report and Order*, which adopted rules for the auction of C Block spectrum, and the commencement of that auction.

B. In the Interest of Expediting Service to the Public and Introducing New Competition Into Wireless Markets, the FCC Should Minimize the Potential for Appeals and the Concomitant Risk of Judicially-Imposed Delays

PCIA has been a long-time supporter of the goal of increasing diversity in telecommunications through participation by additional minority- and women-owned businesses. However, the risk of delays caused by: (i) the uncertain state of the law regarding race- and gender-based preferences; (ii) the difficulty of meeting the applicable court standards; and (iii) the time required to develop a record capable of supporting judicial review in this instance outweighs the potential benefits of adopting race- or gender-based preferences in the D, E, and F Block auctions.⁹ Accordingly, PCIA concurs with the Commission that "we should not delay the F block auction for the amount of time it would

⁸ Notice, ¶26.

⁹ See generally *id.*, ¶¶15-25.

take to adduce sufficient evidence to support our race- and gender-based F Block provisions."¹⁰

At the same time, PCIA believes the goal of promoting entry into telecommunications markets by women- and minority-owned companies can be efficiently accomplished through alternative means. For example, PCIA believes that increased diversity can be achieved in part through additional outreach to minority-owned and women-owned businesses. As the FCC observes, "of the 255 bidders that qualified to bid in the C block auction, 46 claimed minority-owned business status and 34 claimed women-owned status[, which] . . . indicate[s] that even without [race- and gender-based preferences] . . . , women- and minority-owned businesses were able to participate in the auction."¹¹ This demonstrates that the attention initially generated by the preferences was sufficient to attract -- and hold -- the interest of women- and minority-owned applicants, despite the fact that extensive preferences ultimately were not used.¹²

PCIA also believes increased diversity can be achieved through adoption of strong measures favoring small businesses. With increased awareness of opportunities in telecommunications, small women- and minority-owned enterprises can take advantage of small business incentives to compete with other companies and established service providers. Indeed, as the Commission noted, a substantial number of minority- and women-owned

¹⁰ *Id.*, ¶26.

¹¹ *Id.*, ¶27.

¹² *Id.*

businesses were able to qualify for the C Block auction in this manner.¹³ Accordingly, PCIA believes the Commission should, instead of adopting potentially unconstitutional race- and gender-based preferences, concentrate on outreach to minority and women groups and adopt strong preferences for small businesses to achieve greater diversity in the communications field. In this regard, PCIA discusses below some proposed measures to assist small businesses in obtaining PCS authorizations in furtherance of diversity.

III. THE COMMISSION'S AUCTION PLAN FOR THE D, E, AND F BLOCK PCS LICENSES SHOULD PROMOTE ENTRY BY SMALL BUSINESSES

As previously noted, PCIA is a strong supporter of participation by small business interests in the telecommunications marketplace, including small businesses owned by women and minorities. PCIA represents a broad range of small telecommunications interests and believes that these companies have provided, and will continue to provide, innovation and strong competition in the wireless field if they can surmount the existing barriers to entry. In order to assure that these companies have the ability to enter the PCS marketplace, PCIA suggests the following measures:

- ▶ The FCC should adopt strong policies to promote capital formation and participation by small businesses.
- ▶ The FCC should set aside the F Block for entrepreneurs and small businesses.
- ▶ The FCC should auction the D, E and F Block licenses concurrently to expedite entry of new service providers into the wireless marketplace. If it

¹³ *Id.*

appears likely to the Commission in acting in this proceeding that legal challenges would in fact delay the auction for the 10 MHz spectrum blocks, the FCC should separate out such spectrum blocks and auction those licenses not subject to challenge as quickly as possible.

Each of these points is discussed in further detail below.

A. The FCC Should Stimulate the Formation of Viable Small Business Applicants

The FCC's regulations governing qualification as an entrepreneurial company or small business must carefully balance two goals: (i) ensuring that entrepreneurs and small businesses retain operational control over applicant enterprises, and (ii) allowing entrepreneurs and small businesses the flexibility in organization necessary to attract financing. Because investors typically seek greater ownership and control of an enterprise as their capital contribution increases, these goals are difficult to reconcile. Experience with the C Block auction has demonstrated, however, that the FCC's current regulatory scheme, which imposes stringent safeguards to ensure *de jure* and *de facto* control is maintained by small businesses, allows applicants to attract investment and stimulates the formation of economically viable enterprises. Under the circumstances, PCIA provides below its input on a few proposals to add a degree of additional flexibility in cases where control is clearly established in the hands of small business interests.

First, PCIA believes the FCC should adopt the *Notice's* proposal to allow small businesses to utilize the 50.1/49.9 percent equity option.¹⁴ Under this proposal, a small business could establish a "control group" with 50.1 percent ownership and obtain a non-attributable investment of up to 49.9 percent by non-small business interests. In addition, a percentage of the control group's equity can be held by certain classes of investors. At the present time, however, this enterprise structure is available only to women- and minority-owned companies for the F Block auction.¹⁵ Consistent with its belief that the FCC should adopt strong small business policies in lieu of potentially judicially risky race- and gender-based preferences, PCIA believes this equity structure should be extended to all small businesses for the F Block auction. This action will provide increased opportunity for small businesses to secure adequate financing without relinquishing control. Moreover, broadening the scope of this exemption will not detract from the ability of minority- and women-owned companies as small businesses to attract equity investors.

Second, PCIA supports the proposed modification that was adopted in the C Block auction to allow small businesses to pool their resources by not aggregating the assets of affiliates that would themselves qualify as entrepreneurs.¹⁶ As the FCC notes, this exemption was adopted in the *Sixth Report and Order* as a compromise between the then-existing rule, which strictly applied the small business capital limits to enterprises composed

¹⁴ *Notice*, ¶31.

¹⁵ *Id.*

¹⁶ *Id.*, ¶38.

of numerous small businesses, and a rule that would have completely eliminated attribution of minority investments. As shown by the record in that proceeding,¹⁷ while there are good policy justifications for allowing small businesses to pool their resources, a rule completely eliminating attribution of minority investments is prone to abuse and may not serve the goal of disseminating licenses among a wide variety of applicants. PCIA accordingly believes that the compromise position that was adopted for the C Block auction provides a balancing of interests that is equally appropriate for the F Block auction. PCIA therefore urges the FCC to adopt an exemption from the affiliation rules for purposes of the 10 MHz auctions that exempts investors that would themselves qualify as entrepreneurs under the rules.

Finally, PCIA concurs with the *Notice* proposal to retain the exemption from affiliation for Indian tribes and Alaska Regional or Village Corporations.¹⁸ Due to the unique financial organization of Indian tribes, attribution of these interests would not serve the purpose underlying the attribution rules, to exclude larger telecommunications companies from bidding on designated entrepreneurial spectrum blocks. PCIA thus urges the FCC to retain the affiliation exemption for Indian tribes and Alaskan Regional or Village Corporations.

By adopting the suggestions proposed in the *Notice*, PCIA believes the Commission will facilitate the ability of small businesses to attract the capital necessary to obtain PCS

¹⁷ *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding*, Sixth Report and Order, 78 Rad. Reg. 2d (P & F) 934, 941-44 (1995).

¹⁸ *Notice*, ¶39.

licenses, as well as to finance build out and start up costs. In this manner, the Commission will promote not only the entry of small business interests, and therefore the entry of women- and minority-owned enterprises, but also the continued participation of these entities as viable competitors in the wireless marketplace. At the same time, the limited exceptions to the affiliation rules will not impair the goal of assuring that it is the small businesses that retain control over the destiny of these licensees and that such businesses are able to reap the rewards of their hard work and innovation.

B. The Commission Should Set Aside the F Block Solely for Entrepreneurs and Small Business Applicants

PCIA also concurs with the Commission that the F Block should remain set aside to ensure that broadband PCS licenses are disseminated among a broad variety of applicants. While other measures, as PCIA suggests below, offer some *hope* of increasing diversity in the industry, only a set-aside will *ensure* participation by small businesses. PCIA accordingly supports the *Notice* proposal to designate the F Block solely for qualifying entrepreneurs, and suggests below specific rules for small business participation in the F Block auction.

In this regard, however, PCIA disputes the *Notice's* tentative suggestion that licensing of the 10 MHz spectrum is somehow a "smaller" business than the 30 MHz spectrum, and therefore that reduced bidding credits, less favorable installment payment plans, and

increased upfront payments may be appropriate.¹⁹ The FCC in this instance fails to recognize the realities facing small entrants. Despite the fact that the bid amounts for 10 MHz authorizations are likely to be smaller, these spectrum blocks are also likely to generate commensurately less revenue, and therefore the same cash flow problems will face 10 MHz licensees as those with 30 MHz spectrum blocks. Indeed, given the types of niche services contemplated in the 10 MHz allocations, these licenses may represent a riskier investment to financial backers, and the cost of capital for 10 MHz entrants may be greater. At the same time, many of the significant costs of build-out will be the same for both 30 MHz and 10 MHz licensees, such as site acquisition to obtain sufficient coverage. Indeed, given the small range of frequencies available, 10 MHz licensees may have to resort to denser cell configurations with higher overall infrastructure costs. Even if the 10 MHz spectrum licenses are obtained by existing 30 MHz licensees to supplement their allocations and provide a broader range of services, the capital structure of the business dictates providing terms similar to those available for the C Block auction.

PCIA therefore believes the FCC should adopt small business preferences for the 10 MHz F Block licenses comparable to the benefits provided to C Block applicants. Specifically, PCIA believes the Commission should facilitate entry of small business organizations and compensate for the size differentials between entrepreneurial companies and small businesses of various types by adopting different bidding credits for small business participants for the F Block. PCIA therefore suggests adopting the alternative proposal in

¹⁹ *Id.*, ¶¶55-59.

the *Notice*, which provides tiered bidding credits of 10, 15, and 25 percent depending upon the size of the small business.²⁰ Such an action would, in some part, allow a range of small businesses to compete successfully for 10 MHz authorizations, and therefore provide not only for small business participation in PCS, but also participation by different sizes of small businesses.

Similarly, PCIA urges the Commission to adopt a favorable installment payment plan for small businesses participating in the F Block auction keyed to the size of the business, and to continue to use the existing formulas for calculating upfront payments and down payments. Specifically, PCIA suggests adopting the categorizations of small businesses enumerated in the *Notice*²¹ and adopting installment payments plans as follows:

- ▶ Companies with gross revenues in excess of \$75 million would be eligible to pay in installments over ten years, paying interest at the Treasury rate plus 2.5 percent, with interest-only payments for two years and principal and interest amortized over the remaining eight years.
- ▶ Companies with gross revenues between \$40 and \$75 million would be eligible to pay in installments over ten years, paying interest at the Treasury rate plus 2.5 percent, with interest-only payments for three years and principal and interest amortized over the remaining seven years.
- ▶ Companies with gross revenues below \$40 million would be eligible to pay in installments over ten years, paying interest at the Treasury rate, with interest-only payments for six years and principal and interest amortized over the remaining four years.

²⁰ *Id.*, ¶47.

²¹ *Id.*, ¶41.

PCIA also believes upfront payments should remain at \$0.015 per MHz per pop for the maximum number of licenses on which an applicant intends to bid, and that the down payment for winning bidders following the auction should remain at an amount sufficient to raise the payment made to the Commission to 10 percent of the bid amount for licenses won at auction.

Finally, PCIA urges the FCC to adopt its proposal allowing all F block licensees to transfer their licenses within the first three years to any entity that qualifies as an entrepreneur.²² This will provide some protection to licensees entering risky communications ventures, and therefore may facilitate access to capital by small businesses. In addition, reducing restrictions on transfers may potentially facilitate post-auction license aggregation that will allow small businesses jointly to obtain needed economies of scope and scale.

With these measures, PCIA believes the Commission will facilitate the entry of a range of small businesses, as required by statute. The rules also will promote entry by many small women- and minority-owned businesses without embroiling the Commission in potentially risky judicial appeals.

²² *Id.*, ¶62 (transfers to non-qualifying small businesses, however, would be subject to repayment of specific small business preferences granted to the transferor in the bidding process).

C. The Commission Should Auction the D, E, and F Block Licenses Concurrently Unless Legal Challenges Dictate Otherwise

As noted above, PCIA has consistently urged the need for expedition in auctioning PCS spectrum. Any delay in auctioning the remaining 10 MHz PCS spectrum blocks raises a competitive risk for new entrants who hope to compete for customers in the wireless marketplace. For this reason, PCIA generally believes that the FCC should conduct a concurrent auction for the D, E, and F Blocks.²³ At the same time, PCIA urges the Commission to assess the likelihood of legal challenges -- raised directly in connection with one or more of the 10 MHz blocks or stemming out of the C Block auction -- that could delay the auction. If it appears that litigation threatens to derail the 10 MHz block auction, the public interest would be best served by separating out those spectrum blocks subject to legal dispute and proceeding with an auction of those licenses not subject to challenge.

IV. CONCLUSION


PCIA commends the Commission on its efforts to rapidly begin auctioning the 10 MHz PCS authorizations by proposing rules and regulations for competitive bidding even before the C Block auction has closed. PCIA, like the Commission, believes that the prior experiences with set-asides and preferences should form the basis of the rules for the auction

²³ At the same time, PCIA urges the Commission to insure that F Block applicants are afforded sufficient time during and between bidding rounds to assess options and to give due consideration to use of their funds in light of business plans and the nature of the actual bidding activity.

of the 10 MHz licenses, and PCIA generally supports the framework outlined in the *Notice* with the modifications suggested in these comments. PCIA urges the Commission to adopt its proposed auction structure, to facilitate entry by small businesses, and to avoid the risk of judicially-imposed delays.

Respectfully submitted,

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